IN THE GRAND COURT OF THE CAYMAN ISLANDS

GENERAL CIVIL DIVISION

CAUSE NO. G 276 OF 2013

BETWEEN	MINISTRY OF NATIONAL DEFENCE OF THE REPUBLIC OF CHINA (TAIWAN)	PLAINTIFF
AND	1. CHUAN PU ("ANDREW") WANG 2. CHIA HSING WANG 3. SHIN JUN YEH WANG	DEFENDANTS

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 15TH – 17TH MAY 2014 and 13TH JUNE, 2014

APPEARANCES: Mr. Stuart Diamond of Diamond Law, Attorneys-at-Law for the Plaintiff

Mr. Thomas Lowe, QC instructed by Mr. David Butler and Ms. Jessica Williams of Harneys, Attorneys-at-Law for the Defendants

Mareva injunction – whether to be discharged for breach of duty of disclosure – Taiwan – whether a State having standing to sue – whether claim estopped per rem judicatam – election of recovery and double recovery – claim for constructive trust – whether statute barred – substituted service of writ upon foreign defendants without leave of the Court whether service effective.

JUDGMENT

1. On 2nd August 2013, a Mareva injunction was granted in favour of the Plaintiff, the Ministry of National Defence of the Republic of China ("MOND"). The injunction has frozen funds in Court in the amount of USD48 million approximately over which the Defendants claim legal ownership. MOND, in its writ, asserts the existence of a constructive trust impressed over the funds in its favour. MOND's case is based on an

allegation, to be more fully explained below, that the funds are the proceeds of bribery.

2. This is the Defendants' application for the discharge of the Mareva injunction and the release of the funds to them.

Background

3. It is common ground that a much larger sum than the amount in Court – in the order of USD520 million – was paid by way of commission to the First Defendant "Andrew" Wang, in respect of his role in the acquisition of Lafayette stealth class frigates by MOND from Thomson – CSF, at the material times, the agency used by France for its international trade in armaments.

4. The negotiations for the acquisition of the Frigates transpired over several years. The process was prolonged in large part due to the political implications of trade in armaments with Taiwan, in the face of the "One China Policy" of the Communist Party of the People's Republic of China ("PRC").

5. Andrew Wang describes in detail in his second affidavit, the process of negotiations from the mid-1980s until 31 August 1991, when what became known as the "Bravo Contract" was finally concluded between Taiwan and Thomson-CSF. That process latterly involved a two-year period from May 1989 to August 1991 of what Andrew Wang describes as "*detailed and intensive evaluation by over 100 experts in Taiwan*" before the proposals which he claims to have brokered on behalf of Thomson-CSF were finally accepted.

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6. His detailed narrative of the negotiations also seeks to explain, among other things, the reasons for the unusually high percentage of commissions agreed between

Thomson-CSF and himself for his services. This was set at 20% compared to the 15% he had typically received for earlier deals brokered for the French and Germans, for what he describes, rather euphemistically, as "*sales of technical equipment in the military and civil defence sectors*" – to Taiwan. He has, since 1965, he explains, been primarily engaged in this business through his company Cathay Enterprise Co. Ltd. ("Cathay") which was incorporated in Taiwan in that year and which was the company through which he entered into the consultancy agreement with Thomson-CSF for the brokering of the Bravo Contract.

7. It may be inferred that Andrew Wang has greatly prospered from this business of arms brokerage over the years, as evidenced by the fact that Cathay's accounts, when frozen by the Swiss Authorities in relation to their investigations into the Bravo Contract (on which more below), contained more than $900 million – nearly twice the amount of commissions received by Cathay from Thomson-CSF in respect of the Bravo Contract.

8. Andrew Wang's narrative would leave no doubt that all his commissions received including and especially those on the Bravo Contract, were well earned.

9. The process he describes for its procurement was one which was very fraught, not only with technical but also with political and diplomatic challenges as well – challenges which would later come to embroil top level politicians in France in the so-called "Clearstream Scandal" of 2006.

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10. He explains that he had been called upon to intervene at the highest levels. At paragraph 67 of his second affidavit, he states that the French Government had made it clear to him at an early stage that it wanted to minimize diplomatic fallout from the

PRC by using an intermediate/commercial counterparty and without entering any frigate sales agreement directly with Taiwan. It was for that reason that Thomson-CSF was engaged to work with the French Government's *Direction de Construction Navales* ("DCN"), with Cathay as broker and with China Ship Building Corporation and later the Navy of the Republic of China in Taiwan (the "ROCN" - MOND's predecessor in title), as designates of the Taiwanese Government – together the various counter-parties to the Bravo Contract.

11. So pronounced had the concerns of the French over offending the PRC become, that there came a stage when in order to secure the export licences from the French Government, he proposed that the Lafayette frigates could be supplied by Thomson-CSF in prefabricated, pre-equipped platform modules which would have to be assembled in Taiwan.

12. The purpose of that plan – which had found favour with the French Government until the PRC was persuaded to abandon its protest to the sales – was to circumvent the protest by allowing the French to sell "materials" and "technologies", instead of frigates.

13. Andrew Wang now points to the fact that the surmounting of such difficulties, as well as many others of a technical nature, even MOND does not gainsay, was due in very large measure to his efforts.

14. Final negotiations between ROCN and Thomson-CSF (by its successor in title Thales Naval S.A. – "Thomson/Thales") took place in Taiwan on 6th and 7th August 1991. The final gross price of the Bravo Contract was USD 2,525,692,731 for six frigates.

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15. The first payment under the Bravo contract from the ROCN to Thompson/Thales was made on 26th September 1991 and consisted of USD753,775,545.60. A second payment was made on 12th November 1991 and thereafter the remainder was duly paid by the ROCN in installments between 1992 and 2000. Between 1996 and 1998 the six Frigates produced in France were delivered on schedule to the ROCN with no reservations. The Frigates were soon thereafter put into commission by the ROCN. For all purposes of the statutory limitation of any action that could be brought in respect of the Bravo Contract, the latest date any right of action accrued was therefore in 2000.

16. Multifarious allegations of wrong-doing in the procurement of the Bravo Contract started to emerge in the Press and by 2001, there were criminal investigations instituted in Taiwan, France and Switzerland connected with the procurement of the Bravo Contract and the payments of commissions and other payments made pursuant to it.

17. Allegations of bribery were central to the investigations. The Taiwanese Government leveled charges against Thomson/Thales that the price of the Frigates had been artificially inflated to accommodate the very large commission payments, allegedly by way of bribes, made to Andrew Wang and to a Captain Li-Heng Kuo of the ROCN, in particular.

18. Andrew Wang has admitted to the receipt of the commissions in the order of magnitude of $520 million – equating 20 per cent of the Bravo Contract price. He and other members of his family (including the 2nd and 3rd Defendants) having made the very large deposits of commission payments into Swiss bank accounts, an

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investigation was engaged by a Swiss Investigating Magistrate into allegations of money laundering, among other things, and the Wangs' accounts in Switzerland were frozen.

19. The money trail having led from Switzerland to the Cayman Islands, an application for a freezing order was made on behalf of the Swiss Government against the funds now in court (then held in an account with Bank Vontobel, Cayman). It was granted on 19th October 2006 in Cause CJICL 12 of 2006 ('the first injunction") by Quin J. on the application of the Attorney General, acting at the instance of the Swiss Government and in aid of the investigation then underway in that country.

20. The investigation in Switzerland having been concluded on 30 October 2008 without any charges against any member of the Wang family, the first injunction was discharged on 25 November 2009. But immediately following on 25 November 2009, an order was made in Cause POCL 15 of 2009 requiring Bank Vontobel to pay into court "all realizable property" which it held on behalf of the Wangs. This order which brought the funds which had been restrained by the first injunction into court, was made at the instance again of the Attorney General but in aid of local money laundering investigations which had by then commenced. These too, however, resulted in no proceedings being instituted against the Wangs and but for the timely intervention of MOND, by its notification of a claim to the funds, it is fair to say that all restraints over the funds in court would have been lifted once the proceedings in POCL 15 of 2009 were finally concluded.

21. MOND later commenced these proceedings in this Cause on 7th August 2013 but as events had transpired, it was by then not the only party on the hunt for assets.

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22. Strategic Technologies PTE Ltd. ("STPL"), a party entirely unrelated to the Bravo Contract but which had obtained a valuable judgment in Singapore against the Taiwanese Government, had filed an action against MOND in this court in Cause 606 of 2008, for recovery of that judgment debt. On 30th December 2008, STPL obtained an injunction against the funds paid into court (the "second injunction"), relying upon MOND's claim to them and subsequently moved to enforce its judgment against the funds. On 25th June 2009, MOND having failed to file notice of intention to defend the claim, STPL obtained default judgment for amounts totaling USD3.4 million (approximately).

23. On 13 January 2012, Quin J made an order (a charging order: notice to show cause) directing that unless sufficient cause to the contrary was shown at a hearing before this Court on 4th May 2012, MOND's interest in the asset specified in the schedule to that order should, and in the meantime would, stand charged with payment of the sum of USD3.4 million due under the STPL judgment of 25th June 2009, with interest thereon at 6% per annum. The "*asset*" specified in the Schedule "*was the Defendants' [i.e. MOND's] beneficial interest in funds in the sum of approximately USD 48,000,000 held in Court in Grand Court Cause CJICL 12 of 2006 including any interest payments in relation thereto*". By an amendment, made on 8th February 2012, the description of the specified asset was amended by the addition of the words "*and/or Grand Court Cause PACL* (sic) *15/2009*".

24. The hearing of the application for the charging order in favour of STPL to be made absolute came on before Quin J on 2nd August 2013 and was granted, with the further

order that STPL's judgment be satisfied by payment out of the sum from the funds held in court.

25. It appears from the record of the proceedings that Quin J. had then been satisfied – on the basis of affidavit evidence sworn by a local attorney for STPL and placed before him – that MOND had a beneficial interest in the funds paid into court. This occurred in the absence of the Wangs who had been refused an adjournment of STPL's application.

26. Having ordered the payment out in satisfaction of STPL's judgment debt obtained in Cause 606 of 2008, Quin J. further ordered that *"the balance of the funds, originally held in the Courts Funds Office pursuant to the order of 4 December 2009 in POCL 15 of 2009 be restrained until further order"* – in effect, pending the resolution of MOND's claim in this Cause ("the third injunction").

27. On 2nd April 2014, the Wangs' appeal against Quin J.'s order for payment out of the STPL judgment from the funds was allowed by the Court of Appeal. The Court of Appeal found that a beneficial interest of MOND's in the funds had not been properly established such as to justify them being made available to satisfy STPL's judgment and that there had been procedural irregularities in the Wangs not having been treated fairly in relation to their request for an adjournment of the hearing of 2nd August 2013 – that at which the order for payment out was made.

28. It is against that procedural background that the Wangs now apply to discharge the third injunction and so for the release to them of the funds – funds which had been held by Bank Vontobel in accounts nominated respectively in their names.

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29. Their challenge is mounted directly against the grant of the third injunction itself, citing grounds which, if upheld, would forestall the need for a resolution of the underlying issue whether they, or MOND, are the true beneficial owners of the funds. As the legal owners of the bank accounts in which the funds were held, the result would be the release of the funds to them.

30. Before turning to examine each of their grounds in turn – one of which – the limitation ground – MOND has, through Mr. Diamond, conceded before me during the hearing; there is still a bit more of the background to the action that must be recited.

31. Although no criminal proceedings were ever instituted in France or Switzerland (or in this jurisdiction) such proceedings have been instituted in Taiwan. There, allegations of bribery have been raised against Andrew Wang – and against his wife Pauline and son Bruno Wang (for providing assistance to him to secure bribes) – in relation to the Lafayette Frigate Procurement, contrary to the Anti-Corruption Act 2003 of Taiwan.

32. Ms. Yi Fen Ko, prosecutor attached to the Supreme Prosecutor Office's Special Investigation Division ("SPOSID") of Taiwan, exhibits a copy of the indictment to her affidavits filed in this Cause and relied upon now by MOND in support of its resistance to the discharge of the third injunction.

33. In her affidavits, Ms. Ko asserts that the restrained funds are derived from illegal activity, the subject of the charges raised in an indictment in Taiwan.

34. In support of this assertion, Miss Ko cites the fact that Captain Li-Heng Kuo (described by her as *"Chief of Integral Logistics Division of the Navy's Weaponry Acquisition Management Office"*) had admittedly received payment of some

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USD17 million from Andrew Wang through one of his entities, a British Virgin Islands company named *"Euromax"*. Further, that based on his own admissions, Captain Kuo had been convicted in Taiwan for official corruption in the joint indictment on which Andrew, Bruno and Pauline Wang also await arrest and trial in Taiwan. Captain Kuo had been sentenced, among other things, to repay twice the amount he had received and so the sum of USD34 million had been seized in Switzerland under accounts held there in his name and returned by the Swiss Authorities to the Taiwanese Government.

35. Andrew and Bruno Wang admit to a financial relationship between Andrew and Captain Kuo but one which they say had nothing to do with the actual procurement of the Lafayette Frigates or the Bravo Contract itself, but with a business which they intended to establish with Captain Kuo to provide a form of "aftersales service consisting of defences logistics and spare parts centered around the French Frigates", on Captain Kuo's retirement. Andrew Wang cites, in this respect, his entitlement under the consultancy agreements with Thomson-CSF – through Cathay – to set up such a business for 10 years from the date of delivery of the Frigates. He had recognized that with the conclusion of the Bravo Contract, there was to be a huge long-term opportunity for organizing logistics over the life of the Frigates and beyond.

36. Although Captain Kuo was only a middle-ranking officer who could have had and in actuality had had no influence over the decision of the ROCN to acquire the Frigates, he needed someone like him with good connections with the ROCN and experience of logistics to help manage the Taiwanese end of the business. The payment of

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USD17 million to him, says Andrew Wang, represented a significant capital investment towards the establishment of the business.

37. He denies that Captain Kuo ever provided information to assist him in securing the Bravo Contract as alleged by the Taiwanese prosecutors. Captain Kuo had no such information to give, he insists, and no such information was needed. Indeed, the Taiwanese prosecutors have specified no such information or how Captain Kuo could have had any influence on the negotiations. It had for years been public knowledge that Taiwan was in the market for procurement of frigates (an earlier arrangement with South Korea had notoriously fallen through) and the real challenge was getting the French Government to grant an export licence for sale of frigates to Taiwan. It was in this regard that his own role as broker and consultant to Thomson-CSF – not to the ROCN – had been instrumental in securing the Bravo Contract. He had concluded his commission agreement with Thomson-CSF in 1989, fully two years before the Bravo Contract was struck in August 1991. His commission was paid by Thomson-CSF, not Taiwan. During the course of the negotiations he was not and did not act as an official of Taiwan. His last official post with Taiwan was as an air force pilot and engineer in the 1950s. No allegations of corruption had ever been raised against any of the senior officials involved on behalf of Taiwan and with whom he may have dealt on behalf of Thomson-CSF in the procurement or conclusion of the Bravo Contract. For all such reasons, he insists, the allegations of official corruption against him are therefore misconceived and without any basis.

38. Acknowledging that there are outstanding warrants for his arrest and for the arrest of other members of his family on criminal charges in Taiwan, Andrew Wang says that

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they have refused to return to face those charges. *"I cannot imagine"*, he explains, *"that I or my family can face a fair and impartial trial in Taiwan... (after) my image has been completely demonized by the public statements made about my role in obtaining the Bravo Contract"* during *"a sustained media campaign for over 20 years"*.

39. As further proof that he was not involved in paying bribes as alleged to (as yet unidentified) Taiwanese officials, Andrew Wang points to the fact that virtually the entirety of his very large commission payments were still held by him in Switzerland when the corruption allegations emerged. It would appear that the only exception to this were the amount of USD17 million paid to Captain Kuo and the funds now paid into court here. As to the latter, he explains that they were sent to Cayman on the advice of his Swiss bankers for the diversification of his investments.

40. There are two further developments which are relevant to the present application for discharge of the third injunction and to which Andrew Wang also speaks.

41. The first is an arbitral award rendered in Paris on 29th April 2010 pursuant to the Bravo Contract in favour of the ROCN as claimant against Thomson/Thales. The result was that the ROCN was awarded more than USD800 million, representing liquidated damages for the amount of the commissions paid to Andrew Wang (including the USD17 million paid by him to Captain Kuo), plus interest and costs. Effectively, the full amount which the ROCN claimed it had lost, as it alleged, by way of the Bravo Contract price having been "inflated" to cover the costs of the commissions.

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42. Thomson/Thales paid the full amount of the award to the ROCN and had done so well before the date of the filing of this action by MOND on 7th August 2013 and so well before the making of the third injunction on 2nd August 2013.

43. The fact that MOND (as successor in title to the ROCN) had been fully compensated by Thomson/Thales and was therefore in effect, seeking double recovery of the commission losses from the Wangs, was not disclosed to Quin J. It is now part of the Defendant's complaint against the continuance of the third injunction, that MOND failed in its duty of full and frank disclosure in this and other important respects when it obtained the third injunction.

44. It is also of some moment that the Arbitral Tribunal (a respected panel of three eminent jurists) did not base their decision on any finding of bribery committed either by Thomson/Thales or by Andrew Wang as its agent.

45. Rather, their decision was based on a breach of the strict provisions of Articles 18.1 and 18.2 of the Bravo Contract which strictly prohibited payments of gratuities or commissions to agents in the procurement of the Bravo Contract or to any Taiwanese official. This the Bravo Contract did in the following terms: First in Article 18.1:

> *"Article 18:. Gratuity and Commission*
>
> *18.1 No gratuities, gifts or personal payments, either direct or indirect, shall be granted or in any way conferred by the Contractor to any of the officers and/or personnel of the Buyer."*

46. As the payment to Capt. Kuo was made by Andrew Wang, acting not as an official of Taiwan (which he certainly was no longer at the time), ROCN contended (as described at paragraph 332 of the Arbitral Award judgment) that Thomson/Thales breached Article 18.1 by engaging Andrew Wang to act as its agent to make personal

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payments to Captain Kuo in return for information regarding the Bravo Contract negotiations.

47. And in Article 18.2:

> *"18.2 The Contractor represents and warrants that it has not employed or retained any company or person other than its employees to solicit or secure the Contract, nor appointed any agent, representative or other person who has received or will receive a commission, percentage, brokerage or contingent fee in connection with the Contract. Should there be any such person other than the Contractor's employees who shall receive any compensation of any nature from the Contractor in connection with the Contract the Contractor shall identify to the Buyer the identity of such persons and the method and basis of payment."*

48. This was a reasonably standard provision aimed at precluding secret commissions which could be paid to incentivize Taiwanese officials to corruption or which could operate to inflate the contract price. It would be breached either by the appointment of a commission agent or by a failure to disclose his identity.

49. The remedy for a breach discovered after performance of the Bravo Contract described essentially in the nature of liquidated damages, was provided by Article 18.3 in these terms:

> *"18.3 In the event that the Contractor breaches the foregoing provisions as to payment of a commission, percentage,*

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brokerage or contingent fee the Buyer shall have the right to either:

(i) Cancel the Contract for the Contractor's default; or

(ii) Deduct from the Contract Price an amount equal to that of the Commission, percentage, brokerage, contingent fee or any other fees paid by the Contractor."

50. And finally – by Article 18.4 – it was stipulated that the provisions of Article 18 shall survive the completion or termination of the Contract.

51. Given the plain and strict terms of Article 18, no finding of bribery needed to have been made by the Arbitral Tribunal to ground an award and no such finding was made.

52. In the words of the Tribunal from paragraphs 357-360 of the Award Judgment:

"The Arbitral Tribunal can be brief. It is common ground between the parties that Article 18.1 of the Bravo Contract contains a prohibition against the use of agents. It is also not disputed that Respondents employed Andrew Wang as an agent. As the Arbitral Tribunal has found in paragraph 355 above that Andrew Wang made payments to Captain Kuo, this is a violation of the prohibition against indirect payments contained in Article 18.1 of the Bravo Contract. The Arbitral Tribunal notes that the nature of the payments made (e.g. bribes, kickbacks, etc.) is irrelevant to its decision – the simple fact

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that payments were made is sufficient for a finding of liability under Article 18.1 of the Bravo Contract.

The Arbitral Tribunal now turns to Claimants' second claim under this heading, that is, that Respondents have breached Article 18.1 of the Bravo Contract by conferring indirect personal payments on other ROC and/or ROCN officials through Andrew Wang, even if the identity of those officials and the amounts of those payments cannot be determined. Again, the Arbitral Tribunal can be brief. The Arbitral Tribunal considers that this claim is nothing more than a bare allegation. Indeed, the people and payments concerned by this claim have not been identified. Accordingly, as Claimant has not adduced sufficient support from the record, the Tribunal does not consider that Claimant has met its burden of proof and has decided to dismiss its claim.

Accordingly, the Arbitral Tribunal concludes in relation to Article 18.1 of the Bravo Contract that Respondents are in violation of this Article on the ground that they used Andrew Wang to pay monies to Captain Kuo in connection with the Bravo Contract."

53. And, as regards Andrew Wang's involvement, in terms of Article 18.2, the Tribunal concluded at paragraphs 437-441:

"In light of the foregoing [findings in its award], and particularly the admission by the Respondents themselves...the Arbitral Tribunal concludes that Andrew Wang was paid monies as an agent in

connection with the Bravo Contract. It is clear from the record that those monies came from Thomson-CSF, if not both respondents [i.e: both Thomson-CSF and Thales].

....

In addition, as decided by the Arbitral Tribunal in paragraph 288 above, and will be further discussed below, the Arbitral Tribunal finds that the record does not convincingly demonstrate that Respondents identified to Claimant, as required by Article 18/2 of the Contract, "the identity" of Andrew Wang and "the method and basis of payments" made to him. Relatedly, the Tribunal finds Respondents' arguments unpersuasive that they should not be held liable because Claimant purportedly knew of Andrew Wang's participation all along. Indeed, the Tribunal is not convinced that Respondents identified Andrew Wang to Claimant, or that Claimant ever knew of Andrew Wang's true involvement in this matter...."

54. Again, and importantly for present purposes, it is clear that liability in the Arbitral Award for Andrew Wang's involvement was founded not upon any conclusion by the Arbitral Tribunal of corruption or dishonesty, but rather upon a breach of the strict requirements of Article 18.2 on the part of Thomson/Thales.

55. The second matter of moment which had developed before the grant of the third injunction on 2nd August 2013 and which therefore the Defendants assert should have been brought to the attention of Quin J., is a civil judgment of the Taiwan Taipei District Court rendered on October 30, 2012.

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56. It was rendered in an action brought by MOND against many Defendants, including the members of the Wang family and their related entities. Captain Kuo was also joined, albeit then a serving prisoner in a military prison in Taiwan. One gathers from Ms. Ko's affidavits that he was incarcerated in relation to his dealings with Andrew Wang.

57. The District Court's judgment contains a detailed discussion both of the background to the Bravo Contract and of the allegations of corruption and resultant criminal charges.

58. Addressing a civil claim raised by MOND – and which MOND then had standing to bring notwithstanding the pendency of criminal proceedings – it proceeded to dismiss all of MOND's claim as being statute barred, describing its claim in the case as "groundless". The District Court also noted (at part 111 pages 15-16 of its judgment) that criminal charges raised at different times against various Defendants including the Wangs, in relation to the French Frigates procurement scandal, had been dismissed on August 27, 2010, and on June 25, 2011 against six other Defendants, all former Navy officials. It does appear, however, that further criminal charges have since been leveled, those which are the subject of the outstanding warrants of arrest of which Miss Ko speaks in her affidavits.

The legal arguments

59. That being the relevant background, I now turn to the various legal arguments in respect of the discharge of the third injunction. On behalf of the Wangs, Mr. Lowe QC raises two broad heads of challenge to the third injunction.

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60. First, he complains that MOND's failure to make full and frank disclosure has been a gross breach of its duty owed to the Court in applying for the injunction and deserves to be condemned in the strongest terms. For this reason alone, he argues that the injunction should be discharged.

61. The injunction should also be discharged, he submits, because MOND is plainly unable to advance a good arguable case. Its claim is manifestly untenable for a number of reasons, none of which, he says, was fairly presented to the Court when Quin J granted the third injunction and none of which can now be answered.

62. In addition to those broad areas of complaint, the Defendants have a further case for the discharge of the injunction and dismissal of the claim: they say that they have not been validly and effectively served with the Writ. It is one which MOND had no *locus standi* to bring and even if it did, the action is now statute barred.

63. I conclude that these complaints of the Defendants are soundly based. The third injunction must be discharged. This finding does not require me to traverse each and every ground of complaint. I will focus on the most significant grounds, in explaining the reason for my decision to discharge the injunction. In so doing, I acknowledge the extensive and helpful submissions of Mr. Lowe QC, in particular.

The principles governing applications for a Mareva/ Freezing Order

64. The principles governing the Mareva jurisdiction, especially those concerned with full and frank disclosure, are well known. None of these, however, appear to have been drawn to the attention of Quin J by MOND's representatives on 2nd August 2013. Neither STPL's nor MOND's arguments made reference to any such principles

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and there is no note in the brief transcript of the hearing of submissions to suggest otherwise.

65. ***Full and Frank Disclosure:*** The Plaintiff had a duty to make full and frank disclosure to the Court. All matters (not merely facts) which are material to be taken into account by the Court in deciding whether or not to grant relief and, if so, on what terms, must be disclosed when an ex parte application for an injunction is made.

(i) The duty applies to all matters known to the applicant or his attorneys and all matters of which they *should have known* if they had made reasonable inquiries or given adequate thought to the matter.

(ii) The applicant has a duty to make sure as far as he can that the *full story* is before the Court and to that end should ask witnesses to produce all relevant documents.

(iii) The applicant must identify all defences (e.g. limitation or estoppel) which would be available to the defendant had he been present on the application and which a competent lawyer having regard to this requirement would foresee.

(iv) Matters relevant to the assessment of the application, include information about the applicant which would be relevant to the undertakings and which is required to be given to the Court by the applicant. For authority for all those settled propositions see *Gee on Commercial Injunctions* 5th ed. pp239-247).

66. It is the applicant's duty to present the application fairly, as explained in *Memory Corporation v Sidhu [2000] 1 WLR 1443 at 1459* (and as endorsed by this Court in *Cable and Wireless v ICT [2007 CILR 273*]):

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"It cannot be emphasised too strongly that at an urgent without notice hearing for a freezing order, as well as for a search order or any other form of interim injunction, there is a high duty to make full, fair and accurate disclosure of material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case. It is the particular duty of the advocate to see that the correct legal procedures and forms are used; that a written skeleton argument and a properly drafted order are prepared by him personally and lodged with the court before the oral hearing; and that at the hearing the court's attention is drawn by him to unusual features of the evidence adduced, to the applicable law and to the formalities and procedure to be observed."

67. It is now evident that the presentation of the facts to Quin J. did not fairly disclose the nature of the Wangs' defence to MOND's claim as known to MOND at the time and as will be examined under the separate headings below.

68. It makes no difference to the duty then resting upon MOND that the Wangs may have had notice of the hearing. Although on actual notice, the Defendants had no opportunity (as accepted by the Court of Appeal) to correct evidence or to formulate submissions in advance of the hearing, particularly where, as here, no formal notice of the application was given and no evidence served, as required in keeping with the Rules of Court, three days before a hearing: see *CEF v Mundey [2012] EWHC 1524 paras. 179-187.*

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69. In *CEF v Mundey* it is explained that even where a respondent appears on short notice (i.e.: less than the three days required by the Rules) the duty remains on the applicant to raise relevant matters which a respondent, being by virtue of short notice inopportuned, would have failed to raise. Materiality is to be decided by the Court and not by the assessment of the applicants or their advisers: *Thermax Ltd. V Schott Ind. Glass Ltd. [1981] F.S.R. 289 at 295.*

70. The usual sanction for breach of the duty of full and frank disclosure is the discharge of the injunction and the award of costs (and damages if any) to the respondent: see *Cable & Wireless v ICT* (above).

71. ***Service of the Order*:** The order was not served on the Defendants for a number of days after it was made by Quin J. This was entirely inconsistent with the asserted need for urgency by which the application was made and granted without proper notice to the Defendants. See the *Rules of the Supreme Court ("RSC") 1999 Ed.*, the notes at 29/1A/21. An applicant should undertake to serve the injunction order forthwith and to notify the defendant. A proper copy of the order must be served as soon as possible upon the defendant and third parties affected: see The Assios [*1979] 1 Ll R 331.* In cases where the defendant is outside the jurisdiction, that involves the applicant being required to make a separate application for leave to serve out pursuant to Grand Court Rules Order 11. No such application was made here, with MOND instead having sought leave to go by way of substituted service upon the Defendants through local attorneys.

72. Having regard to the established principles, the foregoing procedural failings on the part of the Plaintiff would be sufficient basis, in and of themselves, for the discharge of the third injunction. There were also more substantive failings.

73. ***The Applicant Must Show a Good Arguable Case:*** It is now trite that the Applicant must show that he has a strong claim and a good arguable case to recover damages in an amount at least as great as that covered by the Mareva injunction. See generally, *RSC Order 29*, the notes at 29/1A/12 and *C. Corp. v P 1994-95 CILR 189*.

74. From those sources it is apparent that:

(i) The "good arguable case" threshold is higher than "a serious question to be tried" (as in Order 11 forum applications) even if lower than that on Order 14 summary judgment applications ("no seriously arguable defence").

(ii) The words "strong" and "good" are material. Something "markedly better" must be shown than a case which would pass an application for a strike-out, even if the Court cannot say with confidence that the applicant will win.

(iii) The Court will therefore take into account the apparent strengths and weaknesses of a case, including the apparent plausibility of statements made by the applicant.

75. I find that MOND's case does not pass muster in these respects. It is patently untenable on a number of different levels as will be examined below.

76. ***The Applicant Must Show Objective Risk of Dissipation:*** An applicant must show that there is a real risk that without the Mareva injunction the assets would be dissipated and unavailable to meet any judgment debt awarded in favour of the applicant. This is a matter of first principles as settled in *Mareva Compania Navierca*

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S.A. v Int'l Bulk Carriers S.A. [1975] 2 Lloyd's Rep. 509 C.A., itself. No risk of dissipation could properly have been shown to Quin J. while the funds remained paid into Court.

77. Moreover, no prior notice of the application to be made by MOND on 2 August 2013 was served on the Defendants or anyone known to have acted on their behalf, despite the fact that the funds were and had been secure in Court such that there was no immediate risk of dissipation to be caused by giving notice.

Further Procedural Misconduct/Irregularity

78. The Defendants Chia Hsing and Shiu Jun Yeh Wang (respectively Andrew Wang's wife and son Bruno) were to be regarded as the legal owners of the funds held in Court for the reasons explained by the Court of Appeal in its judgment of 2nd April 2014 in Cause No 606 (above).

79. Accordingly, on 2 August 2013 it was for MOND either to advance a claim for damages or to establish a proprietary claim and prove it has a better right to the funds.

80. The Mareva injunction was granted *ex parte* on 2 August 2013. It appears from the transcript kept by the lawyers who appeared before Quin J. that the hearing was very brief and that:

(i) MOND filed no evidence of any kind but recited a large number of affidavits filed by STPL in Cause 606 of 2008, none of which appeared from the notes of the hearing to have been the subject of discussion or explanation.

(ii) It filed a skeleton argument containing an assertion that Andrew Wang was liable to account as if he had received a bribe by reference to the case of *AG of*

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Hong Kong v Reid [1994] 1 AC 324, a case which was wholly irrelevant because, unlike the crown counsel who was a fiduciary of the Government of Hong Kong in that case, here no member of the Wang family could be described as a fiduciary of Taiwan.

(iii) No attempt was made fairly or at all to explain the significance of matters set out in the affidavit of Bruno Wang in the earlier POCL proceedings, the significance of which was noted by the Court of Appeal. In that very full affidavit, Bruno Wang refutes the allegations of bribery and money laundering in terms which may be regarded as having been acceptable to the Director of Public Prosecution of the Cayman Islands, as no prosecution for any such offence has been brought.

81. Indeed, despite the undertaking to serve the third injunction Order, it was not sent to Harneys (who had appeared for the Wangs in relation to Cause 606 of 2008) until 5 days after the Order was made. The affidavit of Ms. Yi Fen Ko relied upon in support of MOND's application, was not filed and served until 9 August 2013and therefore had not been before the Court when Quin J. took the application on 2 August 2013. Thus, there simply was no evidence before the Court to support an argument for a good arguable case. All that there was were the hearsay affidavits of the local lawyers for STPL.

82. No writ or other proceedings against the Wangs had been issued by 2 August 2013 and no undertaking was given to issue such a writ, as part of the Order. MOND over-optimistically sought payment out to it of the balance of the funds (after payment out of STPL's judgment debt) and it was in that context that Quin J advised

that it would need to bring a separate writ action to achieve that objective. A writ was subsequently issued on 7 August 2013 but that was only once the Defendants had questioned how a Mareva injunction order could have been made without an undertaking to issue and serve such a writ.

83. As already noted, the Plaintiff's attorneys had not obtained leave to serve proceedings on the Defendants out of the jurisdiction under GCR Order 11 and no order was made that such service could be made by way of substituted service under GCR Order 65. The Order allowing MOND to give notice of the injunction by sending it to Harneys as attorneys for the Defendants in this jurisdiction, did not entitle MOND to serve proceedings in that manner upon Defendants who reside outside the jurisdiction in London, England. It is trite that service upon them of the Mareva order by notice to local attorneys, was not the same as service of the writ upon them where they reside for the purposes of submitting them to the jurisdiction of this Court.

84. I will comment further on this aspect of the procedural failings below.

85. Evidence was not served upon the Defendants until 9 August 2013. But on top of being late, that evidence still fails even now to make good the deficiencies in disclosure and other procedural errors discussed in this judgment, all of which were drawn to MOND's attention in the skeleton arguments filed on behalf of the Defendants at the first return date of their application on 12 August 2013.

A Misconceived Claim

86. On 2 August 2013 it was argued before Quin J. that Andrew Wang had received a bribe and the sums in Court were recoverable from him as such. In the evidence served subsequently in the form of Ms. Ko's affidavits, it is suggested that Mr. Wang

had *paid* bribes. It is now contended in the Statement of Claim however, only that Mr. Wang *procured confidential information* to be given to him, supposedly by Captain Kuo.

87. This apparent change of case may not alter the fact that the basis on which the third injunction was made on 2 August 2013 was incurably bad. Moreover, the allegations remain hopelessly general and vague. They simply do not identify the person(s) bribed, the occasion(s), the amount(s), or the consequent action taken by way of breach of duty by the recipient. It is, as Mr. Lowe contends, and as I accept, a wholly un-intelligible claim.

88. MOND seeks to advance a claim of utmost seriousness against the Defendants. It is settled principle that such a claim must be properly set out and particularized. See GCR Order 18 r.8. In this case MOND has investigated the case against the Defendants for more than 14 years. Its failure to present a coherent and detailed case must be seen in that context. The reasonable inference is that MOND simply has no real case to advance in support of its allegations of bribery or breach of fiduciary duty.

89. Its Statement of Claim contains numerous averments which are immaterial to any cause of action and which are themselves in my view, as such, "scandalous and vexatious" and merely vituperative:

(i) The Defendants are repeatedly referred to as "fugitives" and as having "unlawfully evaded justice" (see SC paragraphs 5, 26, 31-32 and 36);

(ii) MOND pleads allegedly inconsistent explanations on the part of the Defendants as to the source of funds when the relevance of such

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inconsistencies, if found to be such, can only be as to evidential creditworthiness (see SC paragraphs 18 to 20 and 36);

(iii) The Statement of Claim makes repeated and vexatious references to criminal offences under Taiwanese law and describes Andrew Wang's conduct as "criminal", "illegal" and "unlawful" when, as the history of the matter shows, no such thing has, as yet, been proven in a court of law or other tribunal.

The contention raised before Quin J on 2 August 2013 that Mr. Wang received a bribe

90. It is common ground that the funds in Court represent remuneration paid by Thomson-CSF to Cathay/Mr. Wang pursuant to the consultancy agreements concluded between Thomson-CSF and Cathay/Mr. Wang in 1989. The funds therefore do not represent monies received from MOND for which it can assert a proprietary claim. No such claim is asserted.

91. Andrew Wang/Cathay was engaged by Thomson-CSF and not by Taiwan with whom he had never been in any form of fiduciary or public service relationship (at least after completing military service in the 1950s). What he received by way of payment therefore could not ordinarily be equated with a bribe.

92. Moreover, Andrew Wang appears to have had a long-standing and established relationship with the French agency, a relationship which predated the Bravo Contract by a number of years. As such, he appears to have previously procured contracts for the sale of defence equipment by the French to the Taiwanese by reason of his expertise in that sphere and his professional background as a pilot and engineer.

93. It was posited before Quin J, on the basis of *A.G. of Hong Kong v Reid* that the funds are impressed with a constructive trust in favour of MOND because they were

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received by Andrew Wang in his capacity as a fiduciary for Taiwan. But unlike Mr. Reid who was crown counsel in Hong Kong and who therefore had received a bribe as a fiduciary, Mr. Wang is shown to have had had no such prior relationship but to have received the commission payments pursuant to a legal agreement between Cathay and Thomson-CSF, an agreement which was itself guaranteed by the French Government.

94. While this conceptual difficulty with its case has not been addressed by MOND, there are also clear limitation difficulties (those frankly conceded by Mr. Diamond) which attend its claim for a constructive trust and which I will discuss more fully below.

Was the commission prohibited?

95. MOND's statement of claim in paragraph 11 alleges that "from the beginning" the French Contractor (Thomson-CSF) was aware of the Taiwanese "general policy" prohibiting intermediaries. It is alleged that the French had "acknowledged" this and that this was expressly incorporated in the Bravo Contract. However, this allegation rolls up several allegations.

96. As for a Taiwanese "general policy", it is unclear how this could have bound Andrew Wang who was not engaged by the Taiwanese or give legal rights against him to Taiwan. It appears that no such policy was documented anywhere until it appeared at the conclusion of the Bravo Contract as Article 18. There is no evidential basis for the allegation of acknowledgement by Andrew Wang of such a policy. Indeed the Arbitral Tribunal having investigated these complaints, is recorded as accepting nothing of the kind.

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97. As can be seen from the Arbitral Award, Article 18 of the Bravo Contract (as set out above from the Award Judgment) contains two distinct promises:

(i) Article 18.1 is a broad anti-bribery provision, which prohibits Thomson-CSF from making payments to officers and personnel of the Taiwanese but the reach of this clause is not confined merely to bribery.

(ii) Article 18.2 was in the form of a warranty that Thomson-CSF had not employed agents or others who would be paid a commission contingent on the conclusion of the Bravo Contract.

98. In addition, the Contract provided for its own remedy. Article 18.3 provided that the damages payable for breach of Articles 18.1 and 18.2 would be the amount of the payment; i.e.: a form of liquidated damages.

99. The Award Judgment also found that there was a breach of Article 18.2 as a result of the arrangement between Thomson-CSF and Andrew Wang (see [2/31] pp95-118). However the finding does not imply any wrongdoing on the part of Mr. Wang:

(i) As the Tribunal explains, on the proper construction of Article 18.2, it was no defence for the French to show that the Taiwanese were aware of the existence of the relationship between Thomson-CSF and Andrew Wang (see [2/31] p97 para 366 and p104 at paragraph 392 and p111 paragraph 418 of the Award Judgment).

(ii) The Tribunal found that Andrew Wang was Thomson-CSF's agent (see p111 paragraph 422-437). This is not denied by Mr. Wang. Indeed it is his case that he was Thomson-CSF's agent pursuant to a legal agreement concluded prior to the Bravo Contract, as the Award Judgment confirms.

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(iii) The Tribunal referred to evidence that showed the Taiwanese relying on Article 18 when the Bravo Contract had been concluded (see p116), but no reference to documentation of the anti-commissioned agent policy prior to that is referenced.

(iv) Whilst the Tribunal held that the Taiwanese did not know of Andrew Wang's "true involvement" as a commissioned agent (see paragraph 441 of the Award Judgment), nobody, not even the Taiwanese, gainsaid the fact that he did have visible involvement (see paragraph 411).

(v) The Tribunal also held that the Taiwanese had not shown that they would not have entered into the Bravo Contract had they known of Andrew Wang's involvement (see paragraph 299-301, 308-312). The arrangement therefore did not vitiate the contract.

Allegations of bribery by Mr. Wang

100. The defect of the lack of fiduciary relationship in the bribery argument having been pointed out, in the exchange of written arguments since the hearing of 2 August 2013 before Quin J.; the recently served Statement of Claim no longer appears to put the case on the basis that the payment received by Mr. Wang itself represents a bribe. The Plaintiff has now substantially altered its case, alleging "breach of trust" instead. This is further to the new allegation of unauthorised disclosure by Captain Kuo of confidential information. This does not prevent the case from being misconceived.

101. MOND has made two allegations of bribery by Andrew Wang:

(1) The first of these concerns an admitted payment of US$17 million made to one identified person, Captain Kuo.

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(2) The other is a wholly generalized allegation in paragraph 17 of the Statement of Claim that Andrew Wang bribed other unidentified officials with unidentified sums.

102. The Tribunal found in its Award Judgment that the payment made by Andrew Wang to Captain Kuo was a contravention of Article 18.1 (see further below). Andrew Wang denies that this payment was a bribe. The Tribunal held that it was unnecessary to determine this (see [2/31] pp95-6 paragraph 357 and above). The Taiwanese were not awarded damages for this.

103. The question whether the payment to Captain Kuo represents a bribe of any kind is in dispute between MOND and Andrew Wang and he has given a detailed explanation of this in his affidavit (see para 97ff) and as summarized above in this judgment. The Taiwanese have not been able to particularize, despite extensive investigations and prolonged interrogation of Captain Kuo, how Captain Kuo could have had any influence on the Bravo Contract.

104. Rather, it is now suggested in the Statement of Claim that Captain Kuo provided Andrew Wang with confidential information (an allegation to be examined further below).

105. The more general allegations that there was bribery of more senior officers such as those made in Statement of Claim paragraph 17 were, however, rejected by the Arbitral Tribunal in their judgment. The assertions made were described as "bare allegations" – MOND had adduced insufficient evidence to substantiate this allegation (see p93 paragraph 344 and p96 paragraph 358-9).

106. Moreover, after a criminal process lasting nearly 10 years, a Court in Taipei has acquitted 6 senior naval officers of misconduct in the acquisition of the Lafayette Frigates, as is apparent from the civil judgment of the Taipei District Court discussed above and (see Andrew Wang's affidavit [1/12] paragraph 94 and exhibit at [2/32]).

107. It is said by Mr. Lowe QC to be of some moment that the French paid Mr. Wang his commission without argument after the Bravo Contract was concluded; and that he was still in possession of the funds paid to him several years later when the Swiss froze his accounts at the request of the Taiwanese. The funds were still in his bank accounts in Switzerland.

108. Inferentially, this would render nonsensical MOND's claim that Andrew Wang was paid commission by Thomson-CSF for the purpose of bribing Taiwanese officials. Save for the payment made to Captain Kuo, it does not appear arguable that any of the funds had been intended, let alone used, for such a purpose.

The claim that Mr. Wang procured confidential information from Captain Kuo

109. This claim is advanced for the first time in MOND's Statement of Claim. In paragraph 13 of the Statement of Claim it is alleged that there was collusion between Mr. Wang and "a number of naval officers" who are not identified. This "collusion" is inferred from two allegations which do not withstand scrutiny:

(i) It is alleged that Mr. Wang had confidential information about a crucial trip by Taiwanese officials (including a General Huo, the man ultimately responsible for advising on the purchase of the French frigates) to Paris – information which Andrew Wang could only have known it is said, by it having been leaked to him by some Taiwanese official. More plausibly however, the

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source of that information could have been the French Government itself (i.e. Andrew Wang's employers) whose immigration service would have had this information well before the arrival of General Huo. Andrew Wang admits to have known of the visit beforehand and to have persuaded the French Government to "roll out the red carpet" for General Huo's visit, a recognition of sovereignty which was no doubt very pleasing to General Huo and the rest of his Taiwanese delegation.

(ii) It is said that Andrew Wang was fully aware of "the specifics of the abandoned Korean Project Kwang Hua 2". This however, is a completely vague allegation. Andrew Wang explains that he did not need technical information about this from the Taiwanese. The Korean frigates were outdated 1960s models and their capabilities were well-known, he says. They did not have the essential stealth or defensive capabilities which were an important selling point for the acquisition of the French Frigates. (See Andrew Wang's 1st Affidavit [1/12] paragraphs 53 and 54).

(iii) There is also an innuendo that the French discovered the secret Taiwanese budget for the Frigates – a matter to be inferred from the alleged fact that the price became 99% of the Taiwanese ceiling (see paragraph 14 of the Statement of Claim). This allegation is unintelligible and leaves unanswered how and when the Taiwanese set the price. In fact, the Tribunal Award shows that the price was very similar to that for the Korean frigates (see also Andrew Wang 2 [1/12] at paragraph 108 and [2/31] paragraphs 114-121).

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110. MOND's Statement of Claim also alleges that the payment made by Andrew Wang to Captain Kuo was for "analyses and suggestions" (see paragraph 16). Again, despite the access which the Taiwanese have had to Captain Kuo, there is no attempt in the Statement of Claim to give particulars of the information provided by him. This is therefore vague and wholly unparticularized pleading. It does not substantiate a claim that information given by Captain Kuo to Andrew Wang was confidential.

111. There are further bald assertions in MOND's evidence, which have not been the subject of pleading. These are addressed in detail by Andrew Wang in his affidavit (see [1/12] paragraphs 105 to 109). I do not see the need to comment upon each of them now.

Captain Kuo's criminal conviction

112. The Statement of Claim and first of Ms. Ko's two affidavits seem to rely on a finding by a Taipei Court following a trial of Captain Kuo who – it must be here emphasized – is a third party to this action; that the funds are the proceeds of a joint enterprise between Andrew Wang, Thomson-CSF and Captain Kuo as a Taiwanese navy officer, for the latter to receive a bribe. There is no particularization of this pleading and it is objectionable to put the matter in this way as an entirely new case that was not put on 2 August 2013 before Quin J.

113. It also appears to be a case without any foundation in fact that could be pleaded. The narrative of the relevant events by the Arbitral Tribunal gives no support to this new case. The Wangs reject the allegations that they were in any form of "joint enterprise" to secure a bribe by Thomson-CSF to Captain Kuo and it must be kept in context that

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the sum allegedly received by Captain Kuo was US$17 million; as compared to commissions paid in the order of magnitude of $520 million.

114. The fact with which MOND has to contend is that Andrew Wang and not Captain Kuo worked for Thomson-CSF. Mr. Wang himself explains how he facilitated the Bravo Contract in considerable detail as referenced above (and in more detail in his first Affidavit [1/12] paragraphs 43-80). MOND presents no evidence to challenge this.

115. The findings of the Taipei Court against Captain Kuo are not binding on this Court and certainly do not bind the Defendants. As a matter of Cayman Islands law, the Taipei Court findings against a third party are inadmissible to prove anything as against the Defendants or to establish any claim to the funds (see *Hollington v F Hewthorn & Co Ltd [1943] KB 587*; *Calyon v Michaelides [2009] UKPC 34).* In *Calyon,* the Privy Council authoritatively declared that the earlier dictum of Lord Goddard given in *Hollington v Hewthorn* is still the law where he said:

> *"This is true not only of convictions, but also of judgments in civil actions. If given between the same parties they are conclusive, but not against anyone who is not a party. If the judgment is not conclusive we have already given our reasons for holding that it ought not to be admitted as some evidence of a fact which must have been found owing mainly to the impossibility of determining what weight should be given to it without retrying the former case."*

116. And, as Lord Rodger went on to explain on behalf of the Privy Council (at paragraph 27):

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> *"...the essential reasoning (from Hollington v Hewthorn) is compelling: unless the second court goes into the facts for itself, it cannot actually tell what weight it should properly attach to the previous decision which means that the previous decision itself cannot be relied upon."*

117. Yet, that is precisely how MOND's Statement of Claim seeks to invite this Court to treat the decision of the Taipei Court as it is said to have concluded upon Captain Kuo's involvement with Andrew Wang.

118. The Taipei Court has not given any detailed explanation of the basis of the finding that Andrew Wang concluded the Cathay commission agreement in April 1989 or September 1989 with Thomson-CSF as a disguised bribe to him and Captain Kuo jointly. There appears no factual foundation for such a case to be made in these proceedings.

The obvious Defences not brought to the attention of Quin J. on 2 August 2013

119. ***Summary*:** Apart from the unparticularized and unsubstantiated basis on which I find that the claim is being advanced; as Mr. Lowe submits, there are a number of further independent reasons why MOND would not be able to establish a good arguable case:

(1) MOND's claim represents a bald attempt at double recovery;

(2) MOND's claim is subject to an unanswerable limitation defence.

(3) MOND does not have capacity (locus standi) to bring any claim.

120. These independent answers by way of possible defences to MOND's claim ought to have been the subject of full and frank disclosure and fair presentation before Quin J.

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As such they serve, in my view, both to defeat MOND's "good arguable case" as well as to reinforce the seriousness of MOND's procedural misconduct.

121. ***Election of recovery***: The payment to Captain Kuo of US$17 million was forfeited over to the Taiwanese by the Swiss as part of a double penalty payment of US$34 million which came from Captain Kuo's Swiss bank account, as explained above (and see Andrew Wang [2/34]).

122. To the extent that the payment may have been a bribe (the factual matter which is in dispute between MOND and Andrew Wang) the Taiwanese thereby elected to recover the bribe from Captain Kuo.

123. MOND therefore cannot now claim that sum again or seek damages for any loss allegedly suffered by reason of that "bribe" (see *Bowstead & Reynolds on Agency 19th ed. Chapter 8*; and *Mahesan v Malaysian Building Society [1974] AC 374*).

124. In the *Mahesan* case, the Privy Council declared (in affirmation of the earlier cases) that a principal (there a Malaysian public housing society) could recover from its agent Mahesan who had taken a bribe, either the amount of the bribe as money had and received or, alternatively, compensation by way of damages for the actual loss sustained through entry by him as its agent into the transaction in respect of which the bribe was given.

125. The fraudulent transaction in that case had involved Mahesan taking a bribe, by sharing in the proceeds paid to the vendor for land purchased for the Building Society at grossly inflated prices.

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126. Applying the principle from the *Mahesan* case here, MOND may not now seek to sue the Wangs to recover the proceeds of the alleged bribe paid to Captain Kuo having elected to recover them from him.

Double recovery

127. In any event, MOND had successfully pursued Thomson-CSF for damages in the Arbitral proceedings. Its 2001 arbitration claim was based on breach of the Bravo Contract, Article 18 of which contained a warranty that Thomson-CSF had not used commissioned agents.

128. The Tribunal made an award against Thomson/Thales for NTD2.520 billion (the equivalent of USD520 million) as compensation but dismissed the claim based on the argument that the price of the Frigates had been fraudulently inflated. The damages were paid to Taiwan by Thomson/Thales (see Andrew Wang [2/38]).

129. MOND has therefore not shown how it has suffered any loss or damage, which was not fully compensated by the Arbitral Award. Yet it made no disclosure at all of this to Quin J. when it applied for the third injunction.

130. On this basis alone of non-disclosure, the injunction must be discharged, quite apart from the negation of "a good arguable case" for MOND, that this circumstance also entails. See *Cable and Wireless v ICT (above).*

Limitation

131. The performance of the Bravo Contract which is said to have been corruptly procured, was concluded in 1991. The facts and matters on which the allegations of corruption are based must necessarily predate that event.

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132. These proceedings are therefore brought in relation to events which are more than 20 years old and which occurred mostly in 1989 and 1990.

133. The remuneration on the contract was fully paid by Thomson-CSF to Andrew Wang by 9 September 1998. The claim is therefore brought 15 years after Andrew Wang's contractual entitlement arose and after he obtained the funds which included the amounts which are the subject of MOND's claim in this action.

134. MOND in these proceedings has failed to explain how it can possibly be the case that any claim against the Wangs can be maintained after this length of time.

135. A brief elaboration on these concerns should suffice. The Taiwanese started the arbitration in August 2001 as can be seen from the Tribunal Award. It follows that MOND must have known of its case by no later than then.

136. That case is now sought to be recast in the mould of a claim for a constructive trust impressed upon the funds paid into Court, as being the proceeds of a fraudulent breach of fiduciary duty.

137. It is claimed that the payments were obtained either as the result of a breach of fiduciary duty owed by Captain Kuo acting in cahoots with Andrew Wang to procure the Bravo Contract or by Andrew Wang deploying the information provided by Captain Kuo in order to procure the contract.

138. Notwithstanding that the payment of the funds to Andrew Wang was made by Thomson-CSF and not the ROCN, the claim is that the payments were a "kick back" from the funds paid to Thomson-CSF by ROCN under the Bravo Contract. Thus, that the payments were made with Taiwanese money and are therefore held by the Wangs

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impressed with a constructive trust for MOND as being money had and received from the Taiwanese in breach of trust.

139. However one views these allegations, what remains clear is that in no true sense can Andrew Wang be regarded as having acted as a fiduciary for the Taiwanese Government. In no true sense can he be regarded as having been bound under an express trust obligation when he contracted (through Cathay) with Thomson-CSF.

140. Again, whatever one makes of the claim that the payments under the Bravo Contract ever comprised of trust property (a proposition which itself has not been explained by MOND); what is clear is that at its highest MOND's claim in this regard is that Andrew Wang became in knowing receipt of money which MOND says belongs to it for having been obtained in breach of trust. It is in that sense that MOND says the funds in Court are impressed with a constructive trust in its favour.

141. And it is in that sense therefore, that the applicability of the Limitation Law (1996 Revision) to claims for breaches of trust must be considered. The relevant provisions are in section 27 of the Limitation Law as follows:

> *"27(1) No period of limitation prescribed by this Law applies to an action by a beneficiary under a trust, being an action –*
>
> *(a) In respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or*
>
> *(b) To recover from the trustee trust property, or the proceeds of trust property in the possession of the trustee or previously received by him and converted to his use;*

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...

(3) *Subject to subsection (1) and (2), an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which another period of limitation is prescribed by any other provision of this law, shall not be brought after the expiration of six years from the date on which the right of action accrued....*"

142. Subsection (3) affords the ordinary statutory limitation defence of six years to trustees unless the alleged breach of trust comes within subsection (1), as being a fraud or fraudulent breach of trust or misappropriation of trust property. In such circumstances, no statutory period of limitation arises to provide a trustee with a defence.

143. But the law is settled that the fraud, fraudulent breach of trust or misappropriation of trust property, must have been committed by someone who is indeed a trustee in the true sense, having come into possession of trust property in that capacity.

144. Where the property sought to be recovered is in the hands of someone who is not a trustee in the true sense, but who is in receipt of the property as the result of alleged wrongdoing in aid of a breach of trust and so deemed a "constructive trustee", subsection 27(1) will not apply. The old equitable rule – now enshrined in subsection 27(1) – that makes a trustee liable to account without limitation of time for his fraudulent conduct, will not apply in such circumstances. Instead, the ordinary six year statutory limitation period will apply so as to provide a defence.

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145. The rationale of this legislative policy is the same as in the equivalent Limitation Act 1980 UK section 21; as authoritatively reviewed and explained most recently by the Supreme Court in *Williams v Central Bank of Nigeria [2014] 2 WLR 35.* The case involved a claim said to have been based on a constructive trust arising from the defendant Central Bank having received moneys deposited with it by the plaintiff's solicitors in fraudulent breach of his instructions not to release the money until his client so required.

146. In his lead judgment on behalf of the Supreme Court, Lord Sumption related the relevant facts, which he described as exotic, in these terms:

> *"Dr. Williams claims to be the victim of a fraud instigated by the Nigerian State Security Services which occurred in 1986. His case is that he was induced to serve as guarantor of a bogus transaction for the importation of foodstuffs into Nigeria. In connection with that transaction, he paid $6,520,190 to an English solicitor, Mr. Reuben Gale, to be held on trust for him on terms that it should not be released until certain funds had been made available to him in Nigeria. Dr. Williams says that in fraudulent breach of that trust, Mr. Gale, knowing that those funds were not available to him in Nigeria, paid out $6,020,190 of the money to an account of the Central Bank of Nigeria with Midland Bank in London, and that he pocketed the remaining $500,000. The Central Bank is said to have been party to Mr. Gale's fraud."*

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147. As the alleged fraud was said to have occurred in May 1986 and the action not commenced until 2010, the issue before the Supreme Court became whether the action was statute barred. Section 21(1)(a) of the Limitation Act 1980 (in terms the same as section 27(1)(a) of the Cayman Law) arose for construction as it would disapply the statutory limitation periods to claims for fraudulent breaches of trust.

148. The Central Bank argued that the words in section 21(1)(a) [as in Cayman section 27(1)(a)] *"to which the trustee was a party or privy"* not only prescribed a constituent of the cause of action by a beneficiary under a trust in respect of any fraud or fraudulent breach of trust but also restricted the exception to the time bar in section 21(3) [as in Cayman section 27(3)] to actions brought against the trustee.

149. The Supreme Court agreed declaring that the words "trust" and "trustee" in section 21(1)(a) of the Limitation Act 1980 bore their orthodox meaning and so, for the purposes of that subsection, a "trust" did not include a constructive trust of the kind alleged against the Central Bank and a "trustee" did not include a party who was liable to account in equity simply because he was a dishonest assister in a breach of trust and/or in the knowing receipt of trust assets.

150. Further, that section 21(3) of the 1980 Act [section 27(3) of the Cayman Law] was intended to relieve trustees, save in the two exceptions set out in section 21(1) [section 27(1) Cayman], from the harsh consequencies of the equitable rule which held them liable to account without limitation of time, and so the exceptions in subsection (1) had to apply to the same persons [(that is: true trustees)] as the rule in subsection (3).

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151. As claims against strangers to a trust for ancillary liability arising from the unconscionability of their conduct and arising independently of any fraud on the trustee's part, were not to be regarded as claims for fraudulent breach of trust by the trustee, such strangers did not come within the words *"party or privy"* to a fraud or fraudulent breach of trust within section 21(1)(a). Those words are applicable only to claims brought against trustees and not to claims brought against anyone else who was involved in the fraud or fraudulent breach of trust. Accordingly, the claim against the Central Bank as constructive trustee was not within the exception to the six year limitation period and was struck out as being statute-barred.

152. On principle, the claim against the Defendants here in the guise of them being constructive trustees for MOND, is indistinguishable. In particular, insofar as it is alleged that Andrew Wang fraudulently received funds belonging to Taiwan, there can be no suggestion that he did so as a trustee in the true orthodox meaning of the word. The concession made by Mr. Diamond in this regard is sound. MOND's claim is subject to the ordinary six-year limitation period prescribed and has been, since no later than 2006, statute barred.

Res Judicata on the Issue

153. In Taiwan the "Ministry of National Defence" (presumably MOND) sued a substantial number of individuals (including the Wangs) and companies for tort. Those proceedings were dismissed on 30 October 2012 by the District Court of Taipei in its civil jurisdiction (see above and Andrew Wang [2nd Aff. para. 29]).

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154. The claim made by MOND against the Wangs therefore appears to be *res judicata*. Under the doctrine of res judicata, a matter that has been adjudicated on by a competent court cannot be re-litigated.

155. *Res Judicata* is a form of 'estoppel by record' which arises when a judgment has been given. See *Arthur JS Hall v Simons, Barratt v Ansell [2000] 3 All ER 673 at 701 HL*, per Lord Hoffmann.

156. A foreign judgment is recognized at common law for this purpose if given by a court which had personal jurisdiction (see *Ricardo v Garcias (1845) 12 C&F 368* or *8 ER 1450* and *Dicey & Morris* .....Ed. paragraph 14-030 to 14-035). The Taipei court declared itself as having personal jurisdiction over the defendants, including the Wangs. Among other things, it declared that MOND's claim was statute barred.

157. As is well known, a judgment in one cause is capable of giving rise to the application of res judicata in another cause. The policy embodied in this maxim was explained by Lord Guest in *Carl Zeiss Stifting v Rayner & Keeler [1967] 1 A.C. 853 at P.933G – 934A:*

> *"The doctrine of estoppel per rem judicatam is reflected in two Latin maxims, (1) interest rei publicae ut sit finis litium, and (2) nemo debet bis vexari pro una et eadem causa. The former is public policy and the latter is private justice. The rule of estoppel by res judicata, which is a rule of evidence, is that where a final decision has been pronounced by a judicial tribunal of competent jurisdiction over the parties to and the subject-matter of the litigation, any party or privy to such litigation as against any other party or privy is estopped in any subsequent*

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litigation from disputing or questioning such decision on the merits (Spencer Bower on Res Judicata, p. 3)."

158. The Taipei Court dismissed MOND's claim against the Defendants. As can be seen from the Taipei judgment, the claims made were at least as extensive as the bribery allegations made in this jurisdiction. If the outcome had been by way of a judgment of this Court (instead of the Taipei Court) it seems there could be little doubt that such a judgment would prevent MOND from litigating the matter afresh here.

159. The juridical reason for this is that the earlier ruling gives rise to cause of action estoppel, barring MOND from bringing the same claim or, at the very least, by way of issue estoppel, preventing MOND from denying as distinct and relevant issues (i) the expiry of the Taiwanese limitation period; (ii) knowledge of all material facts relevant to the claim no later than 2004. As to those two branches of the doctrine of res judicata (i.e: cause of action estoppel and issue estoppel) see Lord Upjohn's and Lord Wilberforce's famous dicta from *Carl Zeiss Stiftung* (above), p.946F -947B and 964 A-F) the latter approving of the earlier observations of Lord Denning in *Fidilitas Shipping v V/O Exportchleb*, and are instructive here as well.

160. The practical implications of the distinction between these two forms of estoppel are that "cause of action estoppel" is an absolute bar to the action whereas "issue estoppel" prevents re-litigation of decided issues.

161. For present purposes the material requirements for both cause of action estoppel and issue estoppel are the same. In particular, each form of estoppel depends on the decision being "*final*" and "*on the merits*": *Regina (Cole-Wallis) v Institute of Chartered Accountants in England and Wales [2011] 2 AC 146.*

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162. The test for an issue estoppel is the same, save that the earlier proceedings must have determined a common issue and not the whole claim. "*Final*" means a judgment that is "final and conclusive on the merits" of the case: *Dicey* op. cit. at para. 14-032 of p.680.

163. *In The Sennar (No. 2) Ŧ[1985] 1 WLR 490*, the House of Lords held that a decision by the Dutch Court of Appeals on the applicability of an agreement to submit to the jurisdiction of the Sudanese Court, was a decision on the merits as to whether or not the agreement was binding on the parties.

164. Lord Diplock's formulation was as follows (see p.494):

> *"It is often said that the final judgment of the foreign court must be 'on the merits'. The moral overtones which this expression tends to conjure up may make it misleading. What it means in the context of judgments delivered by courts of justice is that the court has held that it has jurisdiction to adjudicate on an issue raised in the cause of action to which the particular set of facts give rise, and that its judgment on that cause of action is one that cannot be varied, reopened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction."*

165. On Lord Diplock's formulation there can be no doubt that the Taipei judgment was final and conclusive on the merits. It was a judgment by a court with jurisdiction "*adjudicating on an issue raised in the cause of action to which the particular set of facts give rise*".

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166. However, dictum in *The Sennar (No. 2)* from Lord Brandon would suggest that a different view may be taken where the earlier judgment was one which dealt with procedure alone. As he said (at 499 F):

> *"Looking at the matter negatively a decision on procedure alone is not a decision on the merits.*
>
> *Looking at the matter positively a decision on the merits is a decision which establishes certain facts proved or not in dispute, states what are the relevant principles of law applicable to such facts and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned. If the expression 'on the merits' is interpreted in this way, as I am clearly of opinion that it should be, there can be no doubt whatever that the decision of the Dutch Court of Appeal in the present case was a decision on the merits for the purposes of the application of the doctrine of issue estoppel."*

167. Like the obligation to submit to the Sudanese jurisdiction finally determined by the Dutch Court of Appeal, the Taipei Court's decision on limitation was a final conclusion on an issue in the substantive claim before it. Limitation was pleaded and raised by the Defendants by way of defence to the substantive claim before that Court and had to be decided by reference to "certain facts". *"Looking at the matter positively"*, on Lord Brandon's view, the judgment would be seen as being one on the merits. However, *"looking at the matter negatively"*, as Lord Brandon also observed, the question arises whether a decision, *which decides a claim on limitation grounds is "a decision on procedure alone"*.

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168. This, on the House of Lords' authority of *Black-Clawson v Paperwerke Waldhof-Aschaffenburg AG [1995] AC 591*, will depend on whether a judgment dismissing the claim on limitation grounds was procedural or substantive in nature.

169. In *Black-Clawson* the House of Lords held that a German judgment was conclusive as to the German 3-year limitation period but did not give rise to a cause of action estoppel. Since the German limitation period was procedural in that it only barred but did not extinguish the claim, there was no cause of action estoppel.

170. Accordingly, as the English courts would apply the English limitation period the German judgment was no bar to the action brought in England upon the same cause. In so holding, the House of Lords followed the earlier Court of Appeal decision in *Harris v Quinn (1869) LR 4 QB 653,* in which a judgment as to the Manx statute of limitation was held to be purely procedural.

171. The distinction between substantive and procedural limitation periods is discussed by *Dicey* op. cit. in Chapter 7 at paragraph 7-054 p.227. One sees from this discussion that the common law distinguished between limitation periods which "barred a remedy" and those which "extinguished a right". The former deemed procedural, the latter substantive.

172. If the Taipei decision was based on a substantive limitation period operating to extinguish the right to bring the claim before the Court, then the action in this jurisdiction would, quite arguably, have been barred *per rem judicatam* because of the application of the Taiwanese law, when the third injunction was obtained.

173. That was an issue which would have been quite amenable to resolution by reference to expert evidence on the Taiwanese law.

174. MOND failed to disclose any of this to Quin J. when it obtained the third injunction. This too, was a highly material omission.

The status and standing of the Plaintiff

175. MOND, the Plaintiff, appears to be a department in the Taiwanese Government but despite the fact that it has been asked by the Defendants to explain its legal status, it has failed to do so. This is a matter of importance:

(i) In STPL's pleadings in Cause No 606 of 2008 the Defendant was described as "the Armaments Bureau of the Ministry of National Defence of the Republic of China successor to the Procurement Bureau of the Republic of China Ministry of National Defence".

(ii) In the High Court of Singapore, STPL obtained a judgment against a Defendant described simply as "The Procurement Bureau of the Republic of China Ministry of National Defence", no mention of the "successor".

(iii) In the Arbitral proceedings with Thomson-CSF, the claimant was "The Navy of the Republic of China in Taiwan acting through its planning bureau for and on behalf of the Republic of China".

(iv) From the Minutes of the Quin J.'s Order of 2nd August 2013 in Cause No 276 of 2013, it is apparent that the third injunction was granted on the basis that the Plaintiff was also "the Armaments Bureau of the Ministry of National Defence of the Republic of China successor to the Procurement Bureau of the Republic of China Ministry of National Defence".

(v) However, in the final sealed Order of the 2nd August 2013 and MOND's subsequent writ, the Plaintiff is described as "Ministry of National Defence of

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China (Taiwan)". This is not a name that was used previously to describe the party purporting to act as Plaintiff in these proceedings.

176. It is well-settled that in respect of state parties, only recognized governments have the standing to appear in court as plaintiffs. See *City of Berne v Bank of England (1804) 32 ER 636; Taylor v Barclay (1828) ER 769; Gur v Trust Bank of Africa [1986] 1 QB 599.*

177. Thus, no foreign "ministry" has prima facie standing to appear as a plaintiff in proceedings in the Cayman Islands. No evidence has been presented explaining the role of the two "Bureaux" referred to in Cause No 606 of 2008 or the role of the "Ministry of National Defence".

178. Perhaps, regrettably, even Taiwan itself is not universally recognized as a state and the "Republic of China" (as opposed to the PRC) has not been recognized by the United Kingdom since 1950. This is acknowledged in a Statement of 19 March 2009 of the Taipei Representative Office in the UK presented in these proceedings.

179. The UK has no embassy in Taiwan and Taiwan is not recognized as a state by the United Nations. The Republic of China is recognized by 22 countries which do not include the Cayman Islands through the United Kingdom (which is responsible for the Islands' international affairs) or any member of the European Union.

180. MOND, the Plaintiff, made no disclosure of these matters to Quin J. and has not explained how it purports to make a claim to assets which were first frozen in 2006, originally at the application of the Swiss Government.

181. On the face of the papers, I am constrained to hold that there is no party before the Court having standing to sue, let alone to seek an injunction.

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Non-service of the Writ

182. As Mr. Wang explains ([1/12] at paragraph 24) MOND was aware from the affidavit of Chia Hsing Wang sworn in CJICL 12 of 2006 that the Defendants were resident in London, England. That Affidavit also provided an address. Accordingly the Defendants were, to MOND's knowledge, resident outside the jurisdiction of the Grand Court. As such the Plaintiff was obliged to apply for the leave of the Court under GCR Order 11 for service of the writ on the Defendants outside of the jurisdiction.

183. Despite this MOND made no attempt to obtain the leave of the Court for service out of the writ. Instead the writ was addressed to the Defendants' "c/o their attorneys, Harneys". Included within the third injunction at paragraph 6(1) was an order permitting substituted service on the Defendants at their attorneys.

184. GCR O. 10 r. 1(1) provides that *"A writ must be served personally on each defendant by the plaintiff or his agent"* (emphasis added). This rule embodies the principle that it is fundamental to establishing the jurisdiction of the court that a defendant is personally served by a plaintiff with the originating process. Personal service was not effected in this case.

185. GCR O. 65 r. 4(1) gives the court the power to order service otherwise than by personal service but it must appear to the Court that it is impracticable for the plaintiff to effect personal service on the defendant. "Impracticable" in this sense means "practically impossible": *Chile Holdings v Chile Hotel Corp [1997 CILR 319*. The facts on which the application for substituted service is justified must be before the Court and may be set out in an affidavit: GCR O. 65 r. 4(2).

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186. No application for substituted service was made and no evidence put before the Court in support of any such application at the hearing before Quin J on 2 August 2013. There could not at that time have been such an application as the writ had not been issued, no order for leave to serve out had been obtained, and no attempt had been made to serve the writ on the Defendants. There was as at the date of the third injunction, no grounds for an application for substituted service.

187. The scant note of the hearing before Quin J. which was prepared by MOND's attorney, makes no reference to substituted service (or leave to serve out for that matter) even being raised with the learned judge. Yet the freezing order as presented contains a paragraph granting substituted service. How an order which had never been sought came to be included in the third injunction order requires an explanation. None has been provided.

188. No attempt at personal service of the writ has been attempted and no properly grounded application for substituted service has been made or order obtained. The Defendants have accordingly not been served and the Court is now invited to make a declaration to that effect, as sought in the Defendants' summons now before the Court.

189. The making of the declaration sought will mean that the writ will have been declared not to have been served more than 6 months after it was issued. Accordingly, the effect of the declaration will be that the writ will have lapsed without being served and the proceedings will have accordingly determined.

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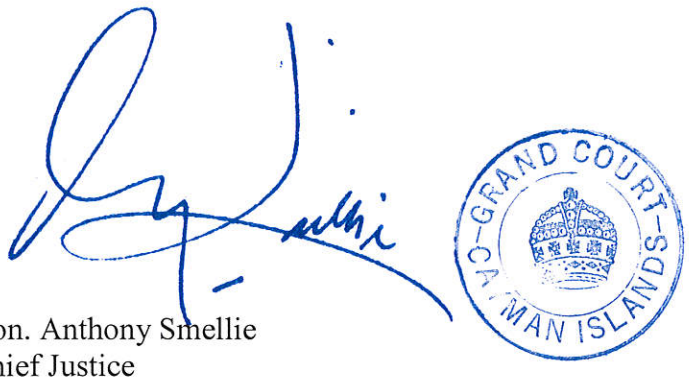
Conclusions

190. For all the reasons identified in this judgment, the Court discharges the third injunction and declares that the Plaintiff has failed effectively to serve the Writ.

191. Even if it had standing to bring a claim, which is doubtful, MOND's claim is accordingly determined. It was, in any event, statute barred as a matter of Cayman law when viewed as a claim for a constructive trust over the funds in Court. It may also well have already been statute-barred by way of the operation of the doctrine of *res judicata,* as a matter that was already adjudicated by a court of competent jurisdiction in Taiwan.



Hon. Anthony Smellie
Chief Justice

June 13, 2014

Written reasons released on 11th July 2014